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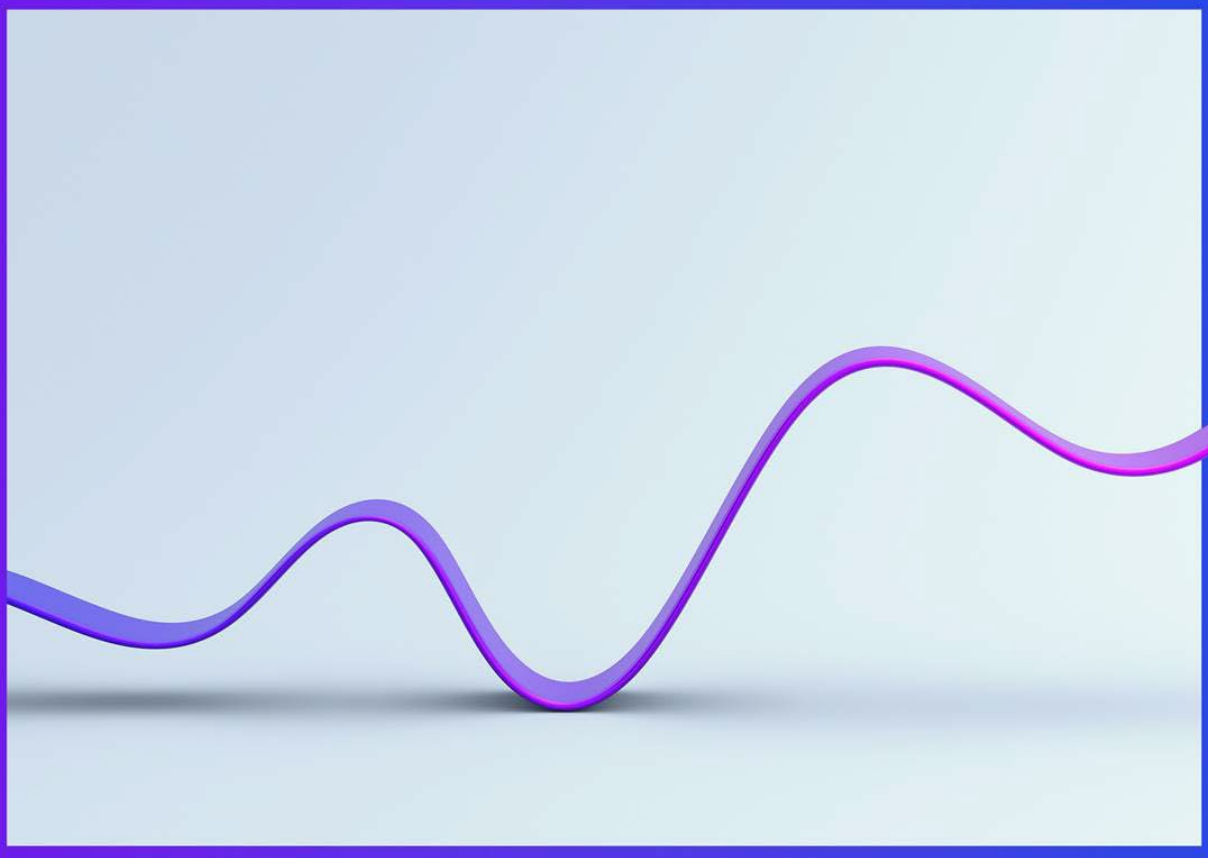

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Direct Tax

1 Direct Tax

1.1 Decisions - International Tax

Salary reimbursed to seconded employees are not taxable as Fees for Included Services under the India-USA tax treaty: ITAT Delhi[1]

The US LLP is engaged in the business of providing professional services in the field of assurance, tax, advisory, etc. to its global clients including India. The LLP seconded employees to its Indian member firms. The LLP received reimbursement of salary and other related cost from the Indian firms. The AO held that the payments received by the LLP on account of seconded employees was taxable as FTS under the India-USA tax treaty.

The Delhi ITAT held that as per the deputation agreement, the seconded personnel are employees of Indian firms. Their income was taxed as salary in their respective hands. Therefore, the same amount could not be subjected to tax twice i.e., firstly in the hands of the seconded employees working in India and secondly again the hands of the LLP. The payment made to the LLP was reimbursement on a cost-to-cost basis. Accordingly, the payment was not taxable as FTS. The ITAT distinguished the decision of Northern Operating Systems[2] on the basis of the facts of the case.

Payment for supply of drawings and designs is not taxable as FTS: ITAT Delhi[3]

A Swiss company was engaged in the business of manufacturing and supply of plant, equipment, drawings and supervision of erection and commissioning services. In terms of the contract entered into with Indian entity, the Swiss Company had received revenue from sale of plant and equipments, sale of drawings and designs and from supervisory services relating to erection and commissioning of equipment. The AO held that the revenue from the supply of drawings and designs and supervisory services was taxable as FTS.

The Delhi ITAT observed that the drawings and designs supplied by the taxpayer were specifically related to the supply of plant and equipments for the Steel Project. The supply of plant and equipment was treated as a sale transaction completed outside India and it was not taxable in India. The sale and supply of drawings and designs being inextricably linked to the sale and supply of plant and equipment has to be considered cumulatively and as a part of sale and supply of plant and equipment. Thus, the payment for supply of drawings and designs was not taxable in India as FTS. With respect to the supervisory activity, the ITAT observed that persons deputed by the Swiss company were qualified technical personnel and they have imparted technical knowledge to the recipient of services. Therefore, the amount received was taxable as FTS under the Income-tax Act, 1961 as well as under the India-Switzerland tax treaty.

1.2 Decisions - Domestic Tax

No deemed dividend in the hands of 'non-shareholder' loan recipient: Ahmedabad ITAT[4]

Aaryavart Infra, a private limited company, received loans and advances from two other private limited companies namely Aaryavart Commodities P. Ltd. and Anmol Tradeline Private Limited. Two Individual shareholders who had substantial shareholding in Aaryavart Infra also held more than 10% shares in the companies which had given loans and advances to Aryavart Infra. Thus, they were common shareholders of both loan giver company and loan recipient company. The AO held that loans and advances received by Aaryavart Infra were taxable as deemed dividend under Section 2(22)(e). The CIT(A) held that Aaryavart Infra was not a shareholder in two

[1] Ernst & Young US LLP v. ACIT (2332/Del/2022) (Del)

[2] CCCE v. Northern Operating Systems Pvt Ltd [2022] 138 taxmann.com 359 (SC)

[3] SMS Concast AG v. DDIT (ITA No.1361/Del/2012) (Del)

[4] DCIT v. Aaryavart Infrastructure P. Ltd. (ITA No. 2105/Ahd/2015) (Ahm)

companies who granted loans and advances to it. Therefore, such amount was though qualified as deemed dividend as per Section 2(22)(e) could not be taxable in the hands of Aaryavart Infra.

After considering relevant decisions on the issue, the Ahmedabad ITAT observed that majority High Courts including the jurisdictional High Court have held that deemed dividend cannot be taxed in the hands of non-shareholders. The ITAT observed that the decision of the Delhi High Court in the case of National Travel Services[5] was based on a totally different aspect of section 2(22)(e), i.e., whether shareholders receiving loans and advances needed to be both registered and beneficial shareholders. Thus, it has no applicability to the current case. Accordingly, Aaryavart Infra who had received advances from the two companies, was not a shareholder of such companies, therefore, even though the advances qualified as deemed dividend in terms of Section 2(22)(e), they cannot be taxed in the hands of the Aaryavart Infra.

1.3 Notification/Instruction

CBDT issues instructions to the AOs to reduce time limit to respond to intimation under Section 245 issued by Centralised Processing Centre (CPC)[6]

In order to avoid delay in issue of refunds, on 31 May 2023, the CBDT had issued an Instruction providing the time limit of 21 days to the taxpayers to respond to the intimations issued by CPC under Section 245(1). In line with the same, in order to minimise the delay in issuance of refund to the taxpayer/adjustment of refund, CBDT vide instruction reduced the time limit of 45 days granted to the AO to respond to CPC to 21 days with immediate effect.

CBDT issues draft notification with proposed changes to Rule 11UA relating to amended angel tax provisions and notifies entities eligible for exemption from angel tax provisions[7]

Where a closely held unlisted company receives any consideration for the issue of shares from any resident exceeding the Fair Market Value (FMV) of the shares, then such excess amount is taxable under Section 56(2)(viib) in the hands of the Company issuing shares (commonly referred to as 'angel tax provisions'). The Finance Act, 2023 introduced an amendment in Section 56(2)(viib) to extend such provisions to the issuance of shares to a non-resident as well.

CBDT issued a draft notification[8] proposing an amendment in Rule 11UA and have notified certain class of persons for exemption from angel tax provisions. The key changes are summarised as follows:

- On issuance of shares to non-residents, in addition to Net Asset Value (NAV) and Discounted Cash Flow (DCF) methods (currently available to residents), five additional methods are proposed for the valuation of unquoted equity shares.
- Where any consideration is received by a Venture Capital Undertaking (VCU) for the issue of shares to a Venture Capital Fund (VCF) or a Venture Capital Company (VCC) or a specified fund, the price of the equity shares corresponding to such consideration may, at the option of VCU, be taken as the FMV of the equity shares for other resident and non-resident investors, subject to the specified conditions. Similar price matching benefit would be available if the issuer Company has received any consideration for the issue of unquoted equity shares from any notified entity[8], within a period of ninety days of the date of issue of shares which are the subject matter of valuation.
- CBDT also proposed to introduce safe harbour limit i.e. the issue price shall be deemed as the FMV of unquoted equity shares if the variation between the issue price and price determined with the methods provided under this rule is not more than 10%. Further, where the date of valuation report by the merchant banker is not more than ninety days prior to the

[5] CIT v. National Travel Services [2012] 347 ITR 305 (Del)
[6] CBDT Instruction No. 1/2023, dated 13 June 2023
[7] F. No. 37049/97/2023-TPL, dated 16 June 2023
[8] F. No. 370142/9/2023-TPL(Part-I), dated 26 May 2023

date of issue of unquoted equity shares which are the subject matter of valuation, such date may, at the option of the assessee, be deemed to be the valuation date.

Foreign Exchange Management Act, 1999

2 Foreign Exchange Management Act, 1999

Resident Individuals Allowed to keep funds in Foreign Currency Account in IFSC for an extended period of 180-days

For making investments in International Financial Service Centre ('IFSC') under the LRS, resident individuals were allowed to open a non-interest bearing Foreign Currency Account in IFSC. Any funds lying idle for a period up to 15 days from the receipt into such foreign currency account was required to be repatriated back to investor's domestic INR account.

Many investors were facing difficulties in making investments in IFSC as the transaction timelines often got extended due to various reasons.

In order to mitigate hardships caused by the investors, RBI by way of A.P. (DIR Series) Circular No. 3 dated 26 April 2023 has brought remittances in such foreign currency accounts at par with the foreign remittances under the LRS. Under this framework, the investors are allowed for a longer 180-day (instead of 15 day) window for repatriation of unutilized funds.

Resident Individuals now allowed to make remittances under the Liberalised Remittance Scheme (LRS) for pursuing courses offered by foreign universities / institutions in IFSC

The RBI vide A.P. (DIR Series) Circular No. 06 dated 22 June 2023 has directed the Authorised Persons to facilitate remittances by resident individuals under purpose 'studies abroad' as mentioned in Schedule III of Foreign Exchange Management (Current Account Transactions) Rules, 2000 for payment of fees to foreign universities / foreign institutions in IFSCs for pursuing notified courses.

Prior to the said announcement, remittances to IFSCs were permitted to resident individuals under LRS only for making investments in prescribed securities.

Indirect Tax

3 Indirect Tax

3.1 Notifications

Special Drive launched against fake registration[9]

A nationwide Special Drive has been launched to detect suspicious/fake registrations by Central and State Tax administrations. They would conduct requisite verification for timely remedial action and safeguard Government revenue. GSTN will share the details of suspicious registrations (identified through data analytics and risk parameters) with the Central and State administration. The list of suspicious registrations may also be supplemented by field formations. If, after the detailed verification, it is found that the taxpayer is non-existent and fictitious, the tax officer will initiate suspension and cancellation of registration of such taxpayer along with recovery of dues and/or provisional attachment of property/bank account. Further, blocking input tax credit in Electronic Credit Ledger may also be examined. Suitable action for demand and recovery of the input tax credit wrongly availed by the recipient based on the invoices issued by the non-existing supplier without an underlying supply of goods or services or both may be initiated. This Drive would be carried out from 16 May 2023 to 15 July 2023.

Aggregate turnover limit to issue e-invoice reduced to INR 5 crores with effect from 1 August 2023[10]

Notification No. 13/2020 – Central Tax dated 21 March 2020 in relation to the generation of e-invoice was issued in supersession of Notification No. 70/2019 - Central Tax dated 13 December 2019. This notification has been amended from time to time to notify certain registered classes of persons required to issue e-invoices under rule 48(4) based on turnover. This notification has been further amended to specify that with effect from 1 August 2023, if the aggregate turnover of certain specified registered persons in any preceding financial year from FY 2017-18 onwards exceeds INR 5 crores (at present, it is INR 10 crores), then such registered persons will have to issue e-invoices under rule 48(4).

CBIC issues Instruction for processing of applications for GST registration[11]

The Central Board of Indirect Taxes and Customs (CBIC) to address the menace of fake registration and fake input tax credit, has issued an Instruction prescribing the guidelines for proper officers for processing of GST registration applications. Gist of important guidelines is as follows:

- After receipt of application for registration in Form GST REG-01, the proper officer shall scrutinize the documents for authenticity and also cross verify the same from publicly available sources.
- Based on data analytics, risk rating would be allocated for each application. Proper officer to consider this rating while verifying and processing the applications.
- Proper officer to issue notice to applicant in Form GST REG-03 within the prescribed time limit for seeking information/clarification.
- Proper officer shall initiate physical verification of place of business where the applicant has either failed to undergo authentication of Aadhaar number or not opted for authentication of Aadhaar number.

[9] Instruction No. 01/2023-GST dated 4 May 2023, CBIC

[10] Notification No. 10/2023 – Central Tax dated 10 May 2023, CBIC

[11] CBIC Instruction No. 03/2023-GST, dated 14 June 2023

- Concerned officer to ensure that physical verification report along with photographs, etc. are uploaded on the system in Form GST REG-30 (Form for Field Visit Report) well in advance of the prescribed time.

CBIC issues circular pursuant to the Supreme Court judgement on pre-import condition for payment of IGST and cess and claiming of ITC[12]

The Supreme Court, vide its judgement dated 28 April 2023 in the case of Cosmo Films Limited, had upheld the validity of the pre-import condition (incorporated in para 4.14 of FTP 2015-20) for exemption from IGST and cess under Advance Authorisation. Pursuant to the directions of the Supreme Court, CBIC has issued a circular for the procedure to pay IGST and cess and to claim eligible input tax credit by an importer who did not fulfil the pre-import conditions. The gist of the circular is as follows:

1) Procedure

- Importers to approach concerned assessment group at port of import with relevant details.
- Assessment group will cancel OOC (Out of charge). Bill of entry will be reassessed.
- Payment of tax and cess along with interest to be made against electronic challan generated in Customs EDI system.
- After above payment, notional OOC for bill of entry on Customs EDI system will be made for transmission of data to GSTN portal.

2) Claim and refund of ITC

- Input tax credit will be subject to conditions and eligibility under Section 16, 17 and 18 of Central Goods and Services Act.
- In case such input tax credit is utilised for payment of IGST on outward zero-rated supply, refund of such IGST paid will be available subject to the provision of Central Goods and Services Act.

3.2 Supreme Court Decision

Pre-import conditions for exemption from IGST and cess are not arbitrary or unreasonable[13]

Notification No. 18/2015-Customs dated 1 April 2015 exempted payment of basic customs duty, additional duty, safeguard duty and anti-dumping duty on inputs imported against a valid Advance Authorisation. On the advent of GST, no amendment was made to this notification. This resulted in the collection of levies for inputs imported into India against Advance Authorisation. On 13 October 2017, Notification No. 33/2015-2020 was issued to amend various provisions of the Foreign Trade Policy whereby “pre-import condition” was incorporated in paragraph 4.14 of the Foreign Trade Policy. Corresponding Notification No. 79/2017-Customs was issued under Customs Act.

Directorate of Revenue Intelligence Kolkata initiated an investigation and issued summons to various manufacturers, including the Petitioner(s). The Petitioners approached the Gujarat High Court, claiming that they were unaware of the “pre-import condition” and continued exports in anticipation of a grant of Advance Authorisation and consequently expected exemption from all custom duty levies, including IGST and compensation cess.

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[12] CBIC Circular No. 16/2023-Cus, dated 7 June 2023

[13] Union of India & Ors. v. Cosmo Films Limited [2023-VIL-47-SC]

The Gujarat High Court quashed paragraph 4.14 of the Foreign Trade Policy relating to the condition of pre-import as ultra-vires in the scheme of Foreign Trade Policy.

The Supreme Court set aside the order of the Gujarat High Court. It held that the exclusion of benefit of imports in anticipation of Advance Authorisation and requiring payment of duties under Sections 3(7) and (9) of the Customs Tariff Act, 1975, with the "pre-import condition", cannot be characterised as arbitrary or unreasonable.

3.3 High Court's Decisions

Delay in issuing show cause notice cannot be the reason for continuing provisional attachment[14]

Petitioner is engaged in manufacturing aluminium frames and similar goods. An inspection was carried out in the business premises of the Petitioner on 24 January 2019 for alleged bill trading. There was a seizure of various documents and electronic devices. An order to provisionally attach various bank accounts was also issued, which was subsequently reimposed twice. Show cause notice was issued on 8 October 2022 in respect of the inspection that had transpired in January 2019.

The Department has contended that there is a continuation of attachment of bank accounts as there is no response by the Petitioner to the show cause notice.

The Madras High Court allowed the writ petition in favour of the Petitioner. It observed that the inspection was carried out in January 2019, whereas the show cause notice was issued only in October 2022. The delay of nearly four years in issuing show cause notice cannot be a reason to continue an attachment under Section 83 of the CGST Act, which itself is provisional in nature.

Provisions of intermediary services are held to be legal, valid and constitutional[15]

The Integrated Goods and Services Tax Act, 2017 (IGST Act) states that the place of supply for an intermediary service where the location of the supplier or location of the recipient is outside India, shall be the location of the supplier of such services. This provision was challenged in the Bombay High Court and was placed before the Division Bench. The Division Bench gave a split verdict and hence the issue was referred to a third Judge (referral Judge) by the Hon'ble Chief Justice.

The referred Judge held that the relevant sections, i.e., Section 13(8)(b) and Section 8(2), are constitutionally valid and intra-vires the IGST Act. After the decision of the referred Judge, the matter was placed before the Division Bench to pass the final verdict.

Considering the views taken by two judges (out of three), the Bombay High Court (Division Bench) held that the provisions of Section 13(8)(b) (dealing with the place of supply of intermediary services where the location of supplier or location of recipient is outside India) and Section 8(2) (dealing with intra-State supply of services) of the IGST are legal, valid and constitutional.

[14] Nitesh Jain Mangal Chand v. The Senior Intelligence Officer, DGGSTI, Chennai [2023-VIL-265-MAD]

[15] Dharmendra M. Jani v. The Union of India and Ors [2023-VIL-346-BOM]

3.4 Tribunal Decisions

Service tax is not leviable on foreclosure charges charged by banks and NBFCs on premature termination of loans[16]

Appellant is a Non-Banking Financial Company (NBFC). It collected foreclosure charges from its customers who desire to terminate a loan agreement prior to the pre-agreed period of the loan. It also collected penal charges in two parts, namely, a fixed transaction charge for the dishonour of a cheque and interest on non-payment of an EMI. The Department alleged that services tax is leviable on foreclosure and penal charges under the category of 'Banking and other financial services' for the period 1 July 2003 to 30 March 2008.

The Tribunal (Chandigarh Bench) held that the foreclosure charges are nothing but damages which banks/NBFCs are entitled to receive when the contract is broken. Accordingly, service tax cannot be levied on foreclosure charges. Further, the Tribunal held that the collection of penal charges arises on account of a separate cause of action which is independent of lending services rendered by the Appellant. Thus, demand for service tax on the amount collected on account of the bouncing of cheques is not sustainable as such an amount is penal in nature and is not towards a consideration for any service.

3.5 Advance Ruling

An agreement between the seller and the purchasing party is a prerequisite for 'incentives' to qualify as a 'trade discount'[17]

Appellant is a reseller. It purchases the products from various Distributors who import them from OEM located outside India. Appellant entered into an agreement with this referred OEM to earn incentives as a percentage of performance to quarterly goal on eligible products. Appellant opines that the incentives qualify as a trade discount. It approached Maharashtra Authority for Advance Ruling (AAR) for a decision in this regard. This AAR gave an unfavorable decision. On subsequent appeal, the Maharashtra Appellate Authority for Advance Ruling upheld the decision pronounced by the lower authority. The gist of the ruling is as follows:

- For the incentives to qualify as a trade discount, an agreement between the seller and purchasing party is a prerequisite which is missing in the instant case between the Distributor and the Appellant. The incentive received from the OEM is separate from the transaction undertaken by the Appellant with the Distributors.
- The payout in the form of incentives is for the supply of marketing as well as technical support services.
- The impugned transaction of receipt of incentives does not qualify as an 'export of service' as the place of supply is in India, i.e., the location where the services are actually performed in respect of goods which are required to be made physically available by the recipient of service to the supplier of service (covered under Section 13(3)(a) of IGST Act). Accordingly, the same is liable to GST.

[16] Clix Capital Services Pvt Ltd v. Commissioner of Service Tax [2023-TIOL-484-CESTAT-CHD]

[17] MEK Peripherals India Private Limited [2023-VIL-26-AAAR]

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